Png Siaw Luan v Wong Tui San & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 523 OF 1990
KARTHIGESU JC
20 JULY 1990

Contract — Construction of agreement — Whether order of sub-clauses can be rearranged — Intention of parties

Civil Procedure — Interim injunction — Failure to make full and frank disclosure — Lack of urgency for ex parte application

The plaintiff and third defendant were shareholders in a company ('the company'). Together with the other shareholders, they entered into a settlement agreement for the disposal of the assets of the company and for the proceeds to be distributed amongst the shareholders. The settlement agreement provided, inter alia, that attorneys would be appointed to dispose of the assets and that these assets would be sold for the best price obtainable on the market but with a right of pre-emption for the shareholders. The assets of the company included a piece of land ('the property').

The attorneys were appointed and wrote to the shareholders informing them that a right of first refusal had arisen with respect to the property. They were told that if they wished to exercise their right, they should submit their offer by way of tender deposit to the attorneys. They were also told that the attorneys had already received a bid from a third party for the property at $11,250,000. The letter further stated that there would be a shareholders' meeting and if more than one shareholder exercised the right of first refusal, the property would be sold to the highest bidder in accordance with cl 3.3 at this meeting.

The plaintiff and third defendant submitted their offers to the attorneys in accordance with the letters. At the meeting the plaintiff protested through her solicitors against the proposal to conduct a competitive bid and insisted that the attorneys should sell to the highest bidder on the basis of the initial bids. After taking legal advice the attorneys determined to proceed as planned and have a competitive bid and they adjourned the meeting till the next morning for the parties to send in their competitive bid, despite the plaintiff's objections.

However, later that day, the plaintiff's solicitors called the attorneys and said that the plaintiff wanted the matter to be concluded as soon as possible and wanted to avoid any unnecessary litigation and asked for the competitive bidding to be held on that day itself. The third defendant agreed. The competitive bids were submitted. The third defendant's bid was $14,500,888 and the plaintiff's was $14,000,800. The initial bids were also revealed. The plaintiff had offered $13,333,000 and the third defendant $11,250,000.

The plaintiff then applied and obtained an interim injunction restraining the attorneys or the company from selling the property until this motion was heard. The plaintiff has applied, inter alia, for a declaration that the attorneys were obliged to open the initial bids and decide on the highest bid on the basis of these bids alone.

The plaintiff argued that the terms of the settlement provided the procedure for the exercise of the right of pre-emption. The attorneys argued that the settlement only imposed substantial obligations, not procedural.

Held, dismissing the plaintiff's application:

(1) The intention in the settlement agreement is to prefer a sale to the parties to the settlement but at no less than the best price obtainable in the open market.

(2) When the sub-clauses of any particular clause in an agreement said to embody the whole of the procedures to determine whether a right has been successfully exercised have to be rearranged to arrive at a particular conclusion, and whereas the sequential reading of those sub-clauses would put that conclusion in doubt, it cannot be said that the parties intended the former.

(3) The settlement agreement, except for the procedure to be followed in giving notice, did not provide for the procedure for determining the highest bidder.

(4) The attorneys' two-stage procedure was eminently reasonable and consistent with the intention of the parties to the settlement agreement.

(5) Even if the above construction is incorrect, the plaintiff's conduct had been both dishonest and unconscionable for her to continue to seek to enforce her rights.

(6) There is a binding contract between the company and the third defendants. There is no legal basis for the plaintiff to attack the validity of the contract. The third defendant is the equitable owner of the contract and the plaintiff's claim based on the interpretation of the settlement agreement cannot prevail over it.

(7) The plaintiff did not make full and frank disclosure of all the facts when she applied for the interim injunction in that she did not reveal that she initially consented to the competitive bidding. The seriousness of this omission is sufficient to discharge the injunction.

(8) At the time of the interim injunction, there was insufficient urgency to justify an ex parte application and this was sufficient basis alone to discharge the injunction.

Cases referred to

1 *Dickson Trading (S) Pte Ltd* v *Transmarco Ltd* [1989] 2 MLJ 408 (distd)
2 *Harvela Investments Ltd* v *Royal Trust Co of Canada* [1985] 2 All ER 966 (refd)
3 *Wickman Machine Tool Sales* v *Schuler (L) AG* [1974] AC 235 (folld)
4 *Shaw & Anor* v *Applegate* [1978] 1 All ER 123 (folld)
5 *Willmott* v *Barber* (1880) 15 Ch D 96 (refd)
6 *Electrolux Ltd* v *Electrix Ltd* [1953] 71 RPC 23 (refd)
7 *Guaranty Trust Co of New York* v *Hannay & Co* [1915] 2 KB 536 (folld)
8 *London Passenger Transport Board* v *Moscrop* [1942] AC 332 (folld)
9 *Tunas (Pte) Ltd* v *Mayer Investment Pte Ltd & Ors* [1989] 2 MLJ 132 (folld)
10 *Castle Fitness Consulting Pte Ltd* v *Manz* [1990] 1 MLJ 141 (folld)
11 *Erinford Properties Ltd* v *Cheshire County Council* [1974] 2 All ER 448 (refd)

Roderick Martin (*B Vijayan Peter* with him) for the plaintiff.
Davinder Singh (*Jimmy Yim* with him) for the first and second defendants.

Michael Hwang (*Chow Khiaw Sing* with him) for the third defendant.

Abdul Rashid (*Latiff Ibrahim* with him) for the fourth defendant.

Cur Adv Vult

Karthigesu JC: By an agreement in writing dated 23 May 1989 ('the settlement agreement') the plaintiff, the third defendant, the fourth defendant and several other persons and companies who are parties to that agreement agreed that the various disputes and differences which had arisen between them should be settled upon the terms and in the manner set forth in the settlement agreement. For present purposes it would be sufficient to note that the natural persons who are parties to the settlement agreement are members of the Phng family or of the extended Phng family and are shareholders in one or more of the corporate persons which are also parties to the settlement agreement.

The broad terms of the settlement was a disposal of all the assets owned by the natural and corporate persons who are parties to the settlement agreement and in order to effect this the parties to the settlement agreement had agreed, before the settlement agreement was entered into, that the task of disposal of their assets should be entrusted to a professional accounting firm. The accounting firm agreed on was Ernst & Whinney now known as Ernst & Young. Accordingly provision was made in the settlement agreement for each of the parties to the settlement agreement to appoint as their attorneys/sales agents Wong Tui San (first defendant) and Abbasbhoy Haider Nakhoda (second defendant) both of Ernst & Young of Singapore for Singapore and Michael Yee Kim Shing and Yeo Eng Seng both of Ernst & Young Kuala Lumpur for Malaysia. See cll 2.4 and 25 of the settlement agreement.

It should be noted however that the attorneys who would be appointed subsequent to the date of the settlement agreement and pursuant to the provisions therein contained were not made parties to the settlement agreement.

The consideration supporting the settlement agreement was one of 'mutual benefits' and 'mutual covenants'. The 'mutual benefits' the parties to the settlement agreement would enjoy was obviously the distribution of the proceeds of sale from the disposal of all the assets. This was to be achieved, as provided in the settlement agreement, by three stages of sale, each stage following upon the failure of the earlier stages. See cll 2.1, 2.2, and 2.3 of the settlement agreement. At the date of the commencement of these proceedings the third stage as provided by cl 2.3 of the settlement agreement had been reached, that is a sale subject to the reserved price to one or more purchasers at the best price obtainable in the open market.

Clause 2.3 provides as follows:

> Sale of assets of principal/subsidiary/associated companies
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> If within two (2) months from the date hereof, all the shares in the principal/subsidiary/associate companies have not been sold and/or all the immovable properties of the principal companies in which shares are left unsold pursuant to clause 2.2 hereof have not been sold, the principal companies concerned as are parties hereto hereby irrevocably:
>
> 2.3.1 offer for sale, subject to the property reserved price, all or any of its/their assets (movable or immovable), and to one or more purchasers, at the best price obtainable in the open market;
>
> 2.3.2 cause its subsidiary/associate companies (where applicable) to offer for sale, subject to the property reserve price, all or any of its/their assets (movable or immovable), and to one or more purchasers, at the best price obtainable in the open market.

It should be pointed out that cl 1.1.64 of the settlement agreement provided a one-year sale period from the date of the settlement agreement or any variation thereof as agreed upon by a concurrence of the majority of groups A and B members within which all the assets must be sold and if not upon the expiry of this period the winding-up provisions set out in cl 6 of the settlement agreement will commence.

The 'mutual covenants' referred to in cl 2.1 of the settlement agreement is stated in these terms in cl 24.

> Mutual covenants
>
> All parties hereto recognize and accept that it is impracticable to provide herein for every contingency that may arise in the course of the performance of the various covenant terms and conditions contained in this agreement and accordingly they hereby declare it to be their mutual intention and hereby covenant that in all cases they shall each use their best endeavours to ensure that this agreement operates as between them fairly and equitably and none of the parties hereto shall do any act or thing which either directly or indirectly may result in any of the other parties suffering any loss or damages whatsoever.

As stated earlier, at the date of the commencement of these proceedings, the third and final stage of sale had been reached but before such a sale could be concluded the natural persons who are parties to the settlement agreement were entitled to the right of first refusal to purchase the asset or assets of the company in which that party was a shareholder. This is provided in cl 3.2 of the settlement agreement.

These proceedings are concerned with the construction of the provisions contained in cll 3.1 to 3.4 and arise in this way.

The fourth defendant was the owner of a property in Singapore known as No 1 Kampong Ampat ('the property'). To effect the sale of the property, inter alia, under the provisions of the settlement agreement the fourth defendant pursuant to cll 2.4 and 25 thereof by an instru-

ment in writing and executed under seal dated 23 May 1989 ('the power of attorney') appointed the first and second defendants (jointly referred to as 'the attorneys' and severally as 'the attorney') their lawful attorneys for them and in their name to perform the several acts specified in the power of attorney severally. The power of attorney, inter alia, provided for the sale of all or any assets of the fourth defendant (cl 1); to appoint engage and remunerate professional advisers (cl 3); to do and carry out all or any acts, deeds, matters and things which the fourth defendant is obliged or required to do under or pursuant to the settlement agreement (cl 6) and to do and carry out all or any acts, deeds, matters and things which are necessary or incidental to the exercise of the powers contained in the power of attorney (cl 7). The word used in cl 7 is 'herein'.

By a letter dated 3 May 1990, the attorney addressed a letter in identical terms to the plaintiff and the third defendant and possibly to the other shareholders in the fourth defendant informing them, inter alia, that a right of first refusal had arisen in respect of the property. A copy of this letter exhibited both by the plaintiff and the third defendant shows it was despatched to each of them by local urgent mail. The attorney states in an affidavit that both letters were despatched on 4 May 1990. The third defendant states in an affidavit filed by him on 18 June 1990 that the letter was received by him on 5 June 1990. There is no evidence of the date the plaintiff received the letter.

The attorney's letter dated 3 May 1990 reads as follows:

> 1 As you are a shareholder of Phng Realty & Development Pte Ltd, who is entitled to the right of first refusal pursuant to cl 3.1 of the settlement agreement, we write to notify you that we have now received an offer to purchase the abovementioned property free from encumbrances at the price of Singapore Dollars Eleven million two hundred fifty thousand only (S$11,250,000) subject to the terms and conditions set out in the attached Form Of Tender.
>
> 2 If you wish to exercise your right of first refusal to purchase the abovementioned property, you are required to make an offer in accordance with cl 3.2 by completing the attached Form Of Tender and submitting it to us c/o Ernst & Young, 10 Collyer Quay #21-01, Ocean Building, Singapore together with a cashier's order/banker's draft for the sum of Singapore Dollars Five hundred thousand only (S$500,000) drawn in favour of Phng Realty & Development Pte Ltd's solicitors, Messrs Khattar Wong & Partners by way of tender deposit and to account of the purchase price of the subject property, under sealed cover marked 'No 1 Kampong Ampat — Attention Mr TS Wong'.
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> 3 Unless the completed Form Of Tender together with the tender deposit of S$500,000 are received by us on or before 10am, 14 May 1990, the right of first refusal referred to in cl 3.1 of the settlement agreement will lapse and cease to be of any force and effect. Further, the attorneys will disregard and will not be bound to accept any offer received from any shareholder within the stated time unless such offer is made on the basis outlined in para 2 above.
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> 4 In the event that more than one shareholder exercising the right of first refusal, there will be a bidding amongst the shareholders who have exercised their right of first refusal and the property shall be sold to the highest bidder in accordance with cl 3.3.

The attorney's letter dated 3 May 1990 was followed by another letter dated 10 May 1990 addressed to the plaintiff's solicitors, Messrs Ng & Ng, and the third defendant respectively. The letter reads as follows:

> As you are aware, shareholders who wish to exercise their right of first refusal to purchase are required to submit their firm offers to reach the attorneys on or before 10am, 14 May 1990.
>
> This is to inform you that there will be a meeting of shareholders/solicitors at 10am, 14 May 1990, at Ernst & Young's board room, level 22, Ocean Building to receive shareholders' offers and in the event that more than one shareholder exercising the right of first refusal, to conduct a bidding amongst the shareholders.

The plaintiff and the third defendant in compliance with the attorney's letters of 3 and 10 May 1990 duly submitted their respective 'firm offers' in sealed envelopes to the attorneys on the appointed day and before the appointed time (before 10am on 14 May 1990). At 10am, the attorneys called the meeting to order. Present were the third defendant and his solicitor, Mr Rajendran, another shareholder, Mrs Dorothy Phng, and her solicitor, Mr Goh Heng Leong, Mr Ng Wing Cheong, the plaintiff's solicitor, and Mr Goh Yong Swee, the plaintiff's husband. The plaintiff joined the meeting at 11am at which time the third defendant left the meeting.

What took place at the meeting as narrated by the attorney (first defendant) in his affidavit filed on 31 May 1990 is that as it appeared that more than one shareholder had exercised the right of first refusal, he decided to explain the procedure he would follow before opening the initial bids. He further explained that pursuant to cl 3.3 of the settlement agreement and his two letters dated 3 and 10 May 1990 he would conduct a bidding between the competing shareholders.

At this point Mr Ng Wing Cheong protested saying that the attorneys were obliged to open the initial bids and to sell the property to the highest bidder. He disagreed with the procedure the attorneys proposed to follow.

A heated argument followed and the attorneys called Mrs Judith Prakash of Messrs Drew & Napier for assistance. She confirmed that the attorneys were correct in the procedure they proposed to follow. The attorneys then announced that the initial bids would not be opened until

10am on 15 May 1990, the next day, by which time the parties were to send in their competitive bids.

Mr Ng Wing Cheong continued with his protest but finding that the attorneys would not alter their stand, left the meeting at about 11am with the plaintiff, who had then arrived, and her husband.

At about 3pm that same day, ie 14 May, the attorney received a telephone call from Mr Ng Wing Cheong who said that the plaintiff wanted to get this whole matter over with as soon as possible and also wished to avoid unnecessary litigation. He inquired whether the competitive bidding could be held on that day instead of on the next day, 15 May. The attorney replied he would bring forward the competitive bidding to 5pm if Mr Rajendran agreed. Mr Rajendran was duly contacted and as the third defendant was with him at the time they both agreed to the competitive bidding being held that day, ie on 14 May at 5pm. The attorney immediately informed Mr Ng Wing Cheong on the telephone that Mr Rajendran had agreed to the 5pm meeting. Mr Ng Wing Cheong confirmed that 5pm was suitable shortly thereafter. The 5pm meeting was confirmed by letter addressed to Messrs Ng & Ng, marked for the attention of Mr Ng Wing Cheong and copied to the third defendant sent to him at Mr Rajendran's office. This letter reads as follows:

> I refer to our telephone conversation this afternoon and write to confirm that there will be a meeting at 5pm, 14 May 1990 at Ernst & Young's office, 22nd level, Ocean Building, Singapore to receive and open the further bid, if any, from the shareholders who have exercised their right of first refusal. As requested, I have contacted Mr Phng Hooi Chay and his solicitor and they will be present at the meeting. You have also confirmed that your client, Mdm Png Siaw Luan and yourself will also be present at the meeting.
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> Please note that the further bid must reach my office on or before 5pm, 14 May 1990 and the bid will be opened immediately thereafter and the highest bidder's offer will be accepted subject to our verification that the initial offer made was a firm offer, on terms no less favourable than the offer referred to in para 2 of our letter dated 3 May 1990 and was accompanied by the required cashier's order.
>
> Enclosed is a copy of the bid form for your client's use if your client wishes to make a further bid. Please note that no further cashier's order is required.

The competitive bids were duly submitted in sealed envelopes to the attorney by the plaintiff and the third defendant shortly before 5pm. At 5pm, the attorney opened the competitive bids first. The third defendant's bid was $14,500,888 and the plaintiff's $14,000,800. The initial bids were then opened to ascertain whether both the plaintiff and the third defendant had complied with the terms of the attorney's letter to them dated 3 May 1990. They had. The result was then announced.

After the result was announced the plaintiff asked the attorney to reveal the offers in the initial bids saying 'since the matter was all over'. After consulting Mrs Prakash, who was present, the attorney informed the plaintiff of the offer prices contained in the initial bids. The plaintiff had offered $13,333,000 and the third defendant $11,250,000 which was the price offered by the third party.

On 17 May 1990, the attorney in separate letters to the plaintiff and the third defendant informed the former that her competitive bid was not successful and returned her bid and the cashier's order for $500,000 which was a requirement of the attorney's letter dated 3 May 1990 and the latter that his competitive bid was successful and requested him to make a further deposit of $950,088.80 to make up 10% of the purchase price.

The foregoing narration is not disputed by the plaintiff or the third defendant.

The plaintiff commenced these proceedings on 22 May 1990 seeking the following reliefs (as amended).

1(a) a declaration that the first and second defendants were obliged under cl 3.2 and/or cl 3.3 of an agreement dated 23 May 1989 ('the said agreement') to open the tenders submitted by the plaintiff and the third defendant in response to the first defendant's letter dated 3 May 1990 ('the said tenders') at the meeting held on 14 May 1990 at about 10.15am at Messrs Ernst & Young, level 22, Ocean Building, Singapore ('the said meeting');

(b)(i) a declaration that the first and second defendants were bound to accept the higher of the two offers contained in the said tenders from the plaintiff and the third defendant ('the original offers') in accordance with cl 3.3 of the said agreement; and

(ii) a declaration that the acceptance by the first and second defendants of the third defendant's offer of $14,500,888 contained in the third defendant's fresh or further tender submitted in response to the second defendant's letter dated 14 May 1990, and/or the agreement arising therefrom, was accordingly void and/or of no effect; and

(c)(i) an order setting aside any agreement for sale between the first and second defendants, as sellers of the said property belonging to the fourth defendant, and the third defendant as purchaser; and/or

(ii) an order that the first and second defendants be directed to accept the offer of the plaintiff for the sum of $13,333,000, being the higher of the two original offers, pursuant to cl 3.3 of the said agreement, completion to take place within forty-two (42) days from the date of such acceptance.

2 Alternatively,

(a) a declaration that the first and second defendants were obliged under cl 3.2 and/or cl 3.3 of the said agreement to open the tenders submitted by the plaintiff and the third defendant before calling for fresh or further bids under cl 3.3 of the said agreement; and

(b) a declaration that the acceptance by the first and second defendants of the third defendant's fresh or further offer of $14,500,888 was accordingly void and/or of no effect.

3 Further, an injunction that the first, second and fourth defendants, by themselves, their agents or servants or otherwise be restrained, pending the hearing and disposal of the present proceedings, from doing the follow-

ing acts of any of them, that is to say, selling, negotiating for sale of, leasing, mortgaging or otherwise disposing of the said property.

4 An order that the costs of these proceedings be paid to the plaintiff by the defendants.

5 Such further or other order as this court may deem fit to make.

Also on 22 May 1990 the plaintiff obtained an interim injunction, ex parte, restraining the first, second and fourth defendants from selling, negotiating for the sale of, leasing, mortgaging or otherwise disposing of the property until after the hearing of a motion returnable on 25 May 1990 or until further order. The notice of motion is dated 22 May 1990.

On 28 May 1990 Mr Justice Punch Coomaraswamy made an order by consent that the amended originating summons (these proceedings), the notice of motion dated 22 May 1990 and any application filed to discharge the order of court dated 22 May 1990, which he had varied by permitting the fourth defendant to lease the property on a month to month basis, or for such longer period, with the written consent of the parties to these proceedings, be heard together on 5 and 8 June 1990. A summons to set aside the interim injunction granted on 22 May 1990 as varied by the order of court dated 28 May 1990 was taken out by the attorneys on 31 May 1990.

I heard the amended originating summons, the motion to continue the interim injunction and the summons to set it aside on 6, 7, 15, 18, 19 and 20 June 1990 (not all days were full days) and stood them over to 25 June 1990 for my decision. I was told that the third defendant's contract to purchase the property, if he had one, was due for completion on 28 June 1990.

On 25 June 1990, I dismissed the plaintiff's claim for the declarations sought in the amended originating summons and set aside the interim injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990. I also ordered costs to the defendants to be taxed, the first and second defendants being entitled to only one set of costs. It followed that the plaintiff's motion to continue the interim injunction was also dismissed.

I reserved for judgment the attorneys' summons to set aside the interim injunction at which time I indicated I would deal with the question of costs on the plaintiff's motion. I now give my detailed reasons for my decision given on 25 May 1990 and my judgment on the matters stood over. An application by the plaintiff for a limited injunction pending the filing of a notice of appeal was refused.

The construction issue

Clauses 3.1, 3.2, 3.3 and 3.4 of the settlement agreement read as follows:

3.1 Each of the parties hereto except for the members in groups D to H shall be entitled to the right of first refusal (as against any offer to purchase by a non-shareholder) to purchase the shares of any of the principal/subsidiary/associate companies or the assets of such companies in which such party is a shareholder.

3.2 Where an offer has been received from any party hereto in manner allowed under clause 3.1 hereof, the shares of the company or asset which forms the subject matter of the offer made pursuant to clause 3.1 hereof shall be sold to that party from whom the offer is received to the exclusion of all others provided always that all of the following requirements are satisfied:

3.2.1 the offer price of the party hereto shall not be less than the best price offered (if any) by any third party from whom an offer has been received; and

3.2.2 the offer price shall not be less than the share reserved price or the property reserved price as the case may be.

3.3 In the event of any competition to purchase any shares of an particular company or asset under the provisions of clause 3.2 hereof, the shares of such company or asset shall be sold to the highest bidder who is a shareholder of the company being sold or a shareholder of the company in which the asset is being sold as the case may be.

3.4 The attorneys shall upon obtaining any firm offer from any purchaser or purchasers for the purchase of any of the principal/subsidiary/associate companies and/or the assets of such companies immediately notify the shareholders of the company concerned who are entitled to the right of first refusal herein contained of the price offered and such other terms as the attorneys deem relevant. Any shareholder to whom such notice is despatched shall be entitled within ten (10) days from the date of such notice to make a firm offer to purchase the particular shares of the principal/subsidiary/associate companies or the assets of such companies referred to in the attorneys' notice. The right of first refusal referred to in clause 3.1 hereof shall lapse and cease to be of any force and effect upon the expiry of ten (10) days from the date of the attorneys' aforesaid notice. The attorneys shall not be bound to consider any offer received from any shareholder after the lapse of the said ten (10) day period. The attorneys shall disregard and shall not be bound to accept any offer received from any shareholder within the said ten (10) day period unless such offer shall be a firm offer on terms no less favourable than the offer referred to in the Attorneys' notice.

Mr Martin stated that the plaintiff's position was that the words or expressions used in all the sub-clauses of cl 3 were clear and unambiguous and reflected the parties' intention, whether they were read on their own, or within the context of cl 3, or with the entire agreement in mind. This intention, he submitted, was that when the entitlement to the right of first refusal arose, and that entitlement arose upon the attorneys receiving a firm offer from an outsider to purchase the property and whether or not that firm offer was above or below the property's reserved price, the attorneys were duty bound to notify the shareholders of the fourth defendant who are entitled to the right of first refusal of the price offered by the outsider and on receiving a firm offer from such a shareholder within ten days of the notification, the property was sold to that

shareholder, provided that the firm offer was not less than the price offered by the outsider and was not less than the property's reserved price. In the event more than one shareholder of the fourth defendant entitled to the right of first refusal made a firm offer within the ten-day period there was a competition in which case the property would be sold to the highest bidder vide cl 3.3, provided of course that those firm offers were not less than the price offered by the outsider and were not less than the property's reserved price. Mr Martin further submitted that the procedural requirements for carrying into effect the expressed intention of the parties as stated above were clearly and unambiguously spelt out in the sub-clauses of cl 3 which called for one and only one bid from the shareholders of the fourth defendant entitled to the right of first refusal. Hence the insistence of Mr Ng Wing Cheong at the 10am meeting on 14 June that the attorneys open the initial bids and his protestations against the attorneys' requirement for a competitive bidding to determine the highest bidder. Hence also the declarations in the forms sought.

Following from his submissions that the sub-clauses of cl 3 contain in clear and unambiguous terms the procedural requirements to be followed by the attorneys, Mr Martin further submitted that the words 'and such other terms as the attorneys deem relevant' which appear in cl 3.4 in the same sentence as the requirement to 'immediately notify the shareholders of the company concerned who are entitled to the right of first refusal' does not enable the attorneys to alter or vary the prescribed procedure as stated by him of a single bid by calling for a two-stage bidding as the attorneys sought to do by the paragraph numbered 4 of the letter dated 3 May 1990 and which the attorneys maintained they were entitled to do at the 10am meeting on 14 May and at the hearing of these proceedings. It was argued that the word 'relevant' restricted the 'such other terms' which the attorneys could impose to such matters as to the manner in which the firm offer was to be made and was clearly intended to prevent the attorneys from arrogating to themselves the power to impose terms which restrict or extend the shareholders' entitlement both to the right of first refusal in cl 3.1 and to that much of the procedure in respect of that entitlement which is expressly laid down in cll 3.2 and 3.3.

A further argument was advanced by Mr Martin that the plaintiff and the third defendant were bound by cl 3.4 to make their firm offers within ten days of the date of the attorney's letter (3 May 1990) notifying them of their entitlement to the right of first refusal notwithstanding that the attorney had specified that the latest time for making the firm offer was 10am, 14 May 1990, thus making it an 11-day period. The question of whether or not the attorneys had the power to extend the time within which the right of first refusal has to be exercised and whether or not the attorneys could still consider such firm offers apart, it was submitted, on the authority of *Dickson Trading (S) Pte Ltd* v *Transmarco Ltd*,[1] ('*Dickson*'s case'), that both initial offers were invalid, being made after the expiry of the ten-day period when the right had lapsed. The argument further proceeds that the contract concluded with the third defendant as a result of the competitive bidding was ineffective as it was clearly held by the attorneys with the intention of carrying out what was thought to be an existing obligation under cll 3.2 and 3.3 when there was no such obligation. There had been no valid exercise of the right of first refusal. In the result the contract for the sale of the property between the attorneys as agent of the fourth defendant and the third defendant arising out of the competitive bidding was void and unenforceable as that contract was based on a mistaken assumption of the rights and obligations of the parties under cl 3. The authority for this proposition is *Harvela Investments Ltd* v *Royal Trust Co of Canada*[2] ('*Harvela*'s case').

It will be noted that the right of first refusal arises only when the assets of the company which is a party to the settlement agreement is being sold in the open market under cl 2.3 and that the right is limited to the shareholders of that company.

The terms of cl 2.3.2 are explicit. Relating it to this case the fourth defendant's obligation is to cause the property to be sold in the open market at the best price obtainable subject to the property's reserved price. This obligation of the fourth defendant is qualified by cl 3.1 by the terms of which the fourth defendant is obliged to offer the property first to its shareholders as it will be noted from the words in brackets, 'as against any offer to purchase by a non-shareholder'. The words 'any offer' must be seen in the context of cl 2.3.2 where the expressed and clear intention is to get the 'best price obtainable in the open market' subject to the property's reserved price.

In my view any offer from an outsider would not do. It must be an offer conforming to the provisions of cl 2.3.2 and only on such an offer which being a firm offer being received, that is to say a committed offer from which the offeror cannot resile, will the entitlement of the right of first refusal under cl 3.1 arise.

To hold otherwise would be to disregard what I see to be the declared intention of the parties to be gathered from cll 2.1, 2.2 and 2.3. One is not concerned with a failure of cl 2.3 as the parties have provided by cl 6 what is to happen in that event.

Were the intention of the parties to sell the assets of a company to its shareholders through the machinery of a first refusal at no less than the property's reserved price, I cannot see the point of providing for a sale in the open market at the best price obtainable subject to the property's reserved price.

Fortunately this is not an issue in this case. Be that as it may, clearly when the third stage of sale is reached, the intention expressed in the settlement agreement is to prefer a sale to the parties to the settlement agreement but at no less than the best price obtainable in the open market subject to the reserved price.

The further intention of the parties is to be gathered from cl 24 of the settlement agreement which has already been set out in full earlier.

This clause is clear and unambiguous. Whilst acknowledging that not every contingency can be provided for, the parties *declare* their *mutual intention* (emphasis added) which is that the settlement agreement 'operates as between them *fairly* and *equitably* and none of the parties shall do any act or thing which either directly or indirectly may result in any of the other parties *suffering any loss or damage whatsoever*' (emphasis added).

I now turn to a consideration of cl 3 of the settlement agreement.

I would first observe that Mr Martin's starting point was cl 3.4 which he termed as 'the trigger provision', the mechanism by which the right of first refusal was to arise and which contained the provisions of how and when the shareholders of the company concerned were to exercise that right. He then referred to cl 3.1 and related it to cl 3.4 which together he termed 'the entitlement provisions'. He then argued that when the right of first refusal 'triggered' off by the provisions of cl 3.4 was exercised by the shareholders of the company concerned in accordance with the procedures contained in that clause, the matter fell to be decided by cl 3.2 if only one shareholder had exercised the right and by cl 3.3 where more than one shareholder had exercised the right and there was a competition, subject of course to the provisos contained in cll 3.2.1 and 3.2.2. Clauses 3.2 and 3.3 were together termed as 'the priority determining provisions'. Thus the whole of the procedure for determining the shareholder of the company concerned who had successful exercised his right of first refusal was embodied in the sub-clauses of cl 3.

The argument must be that the sub-clauses of cl 3 rearranged in this manner clearly and unequivocably provide for only one single bidding.

I did not accept this argument. When the sub-clauses of any particular clause in an agreement said to embody the whole of the procedures to determine whether a right has been successfully exercised have to be rearranged to arrive at a particular conclusion and whereas the sequential reading of those sub-clauses would put that conclusion in doubt, it cannot, in my view, be said that the parties clearly and unequivocably intended the former.

The settlement agreement is a long and carefully prepared document which endeavours to settle once and for all, all the disputes, some of which were being litigated, between the parties whom I have already observed are members of the Phng family or of the extended Phng family. Yet the parties have recognized and accepted that it would be impracticable to provide for every contingency that may arise in the performance of the covenants, terms and conditions contained in the agreement and accordingly declared as their mutual intention to be fair and equitable so that none of the parties directly or indirectly would cause the other or others to suffer any loss or damage (cl 24).

The intention I have gathered for the whole of the settlement agreement as I have stated earlier is that when the third stage of the sale of assets is reached, a sale to a party to the settlement agreement who is a shareholder of the company whose asset is being sold is to be preferred to a sale to an outsider provided that the price offered by the shareholder is no less than the best price obtainable in the open market, subject to the reserved price of that asset.

If the plaintiff's construction of cl 3 is correct, which construction becomes possible only by a rearrangement of the sub-clauses of cl 3, then every shareholder exercising the right of first refusal when entitled to do so would have to make an offer on the basis that he was competing with another shareholder or shareholders with a similar entitlement with the result that, if he were the only shareholder who had bid, he may end up paying more instead of not less than the best price offered by any third party from whom an offer had been received, provided of course the requirements of cl 3.2.2 (reserved price) are fulfilled. Having regard to the views I have expressed earlier, the words 'if any' in brackets in cl 3.2.1 must be considered otiose.

This is not what the parties intended. It was never their intention that the *only* interested shareholder entitled to the right of first refusal of an asset in the company concerned and exercising it would have to pay more than what a third party had offered for that asset provided it was not less than the reserved price for that asset. To argue that the parties intended this, which is the consequence of the plaintiff's interpretation of cl 3, if it be correct, would run counter to the parties' declared 'mutual intention' in cl 24 to act fairly and equitably between themselves and not cause the other or others to suffer any loss or damage. The result is unreasonable. If this was their intention thent it should have been made abundantly clear. (See *Wickman Machine Tool Sales* v *Schuler AG*.[3])

Furthermore, all counsel are agreed, with which I also agree, that cl 3.2 is drafted on the basis of a single offeror. There is no provision in cl 3 or indeed anywhere in the settlement agreement which provides a procedure for determining whether or not there is a competition and if there is one how the bidding between the competitors is to be carried out.

All that cl 3.3 provides is that in the event of any competition the assets shall be sold to the highest bidder. I would apprehend that this provision was included to deprive the attorneys who by the provisions of cll 2.4 and 25 of the settlement agreement are entrusted with the conduct of the sales, from refusing to sell to the highest bidder in the exercise of their discretion. The reference to cl 3.2, which as noted above is tailored for a single offeror, in cl 3.3 gives rise to an ambiguity and exposes the lack of procedural content, save for the limited procedure contained in cl 3.4.

Thus the plaintiff's approach to rearrange the sub-clauses of cl 3 in an attempt to give cl 3 procedural content leads to a construction which runs counter to what I have found to be the true intention of the parties.

The lack of procedural content in the provisions of cl 3 and the ambiguity that arises therefrom are clearly seen when the sub-clauses of cl 3 are read in their sequential order as they ought to be.

Mr Davinder Singh for the attorneys submitted, with which Mr Michael Hwang for the third defendant and Mr Rashid for the fourth defendant agreed, that cll 3.1, 3.2 and 3.3 impose substantive as opposed to procedural obligations on the company concerned. These clauses, it was argued, do not dictate or define the method by which the company concerned is to discharge its substantive obligation under the settlement agreement of giving its shareholders the first right of refusal and of selling the assets to the highest bidder amongst them. With this submission I totally agree as I do also with the submission that there was no legitimate basis or need to imply into cll 3.1, 3.2 and 3.3 the procedure to be followed.

Clause 3.4 does, however, as previously noted, contain some procedural requirements. These do not deal with the procedure for determining the highest bidder. It deals with the procedure to be followed by the attorneys for giving notice to the shareholders of the company concerned who are entitled to the right of first refusal of the price offered and such other terms as the attorneys deem relevant upon obtaining any firm offer from any outsider for the purchase of the assets of the company concerned, the time within which the right is to be exercised and other related matters with which I shall deal later.

Looked at in this way, which in my view, is the logical way of looking at the provisions contained in cl 3 and not by rearranging the sub-clauses, it will be appreciated that except for the limited procedure contained in cl 3.4, there is a singular lack of procedure for determining the highest bidder. Certainly there is no clear and unambiguous provision or words and expressions which spell out a single bid procedure for determining the highest bidder in the event there are competitors in the exercising of the right of first refusal.

This lack of procedure would not vitiate cl 3 as it was contemplated by the parties and specifically provided for that the attorneys would be given a power of attorney in a form agreed to by the parties to conduct the sale on behalf of the company concerned. What was lacking by way of procedure in the settlement agreement would be supplemented by the attorneys (see cll 6 and 7 of the power of attorney) in so far as it was necessary for the attorneys to ensure that the company concerned complied with its substantive obligations contained in cll 3.1, 3.2 and 3.3 of the settlement agreement.

Having arrived at the conclusion that at its worst there is no clearly defined procedure prescribed by the sub-clauses of cl 3 of the settlement agreement and at its best any procedure discernable is ambiguous, I turn to a consideration of the procedure adopted and followed by the attorneys for determining the highest bidder.

The duty of the attorneys was to carry out the obligation of the fourth defendant previously stated. In the absence of any clearly defined procedure to be found in the settlement agreement (of which there is none as I have found), and in the absence of a clear direction in the power of attorney as to how the attorneys are to carry out the authorized acts (of which there is none), I apprehend that the law is that the attorneys are entitled to choose a suitable method to carry out those acts, provided it is fair and reasonable and is consistent with the intention of the parties to the settlement agreement. The method chosen must also be made known to the parties concerned clearly and unambiguously. See Aldridge, *Powers of Attorney* (5th Ed) at p 54 et seq.

I have already dealt with at length on what I determine to be the clear and expressed intention of the parties to the settlement agreement. The procedure which the attorneys proposed to follow, the two-stage procedure, was clearly spelt out in the letter dated 3 May 1990 by which the parties were informed of their entitlement to the right of first refusal. The paragraph numbered 4 of that letter leaves no room for doubt. It is as clear as any indication could be to those entitled to the right of first refusal that the first stage would be to determine who amongst those entitled were exercising their right. It is also as clear as any indication could be that in the event more than one shareholder exercised the right of first refusal, '*there will be a bidding amongst the shareholder who have exercised their right of first refusal*' (emphasis added) that is to say a second bidding — the second stage.

In order to leave no further room for doubt and perhaps motivated by the confirmation the third defendant had sought from the attorneys that a two-stage procedure would be followed, the attorneys sent the letter dated 10 May 1990 informing the parties that there will be a meeting at 10am on 14 May 1990 to conduct a bidding amongst the shareholders in the event more than one

shareholder exercised the right of first refusal. It is in my view more than reasonably clear from this letter that the successful bidder would not be determined from the firm offers received before 10am in the event there was more than one firm offer.

What had to be done in order to qualify as having properly exercised the right of first refusal is made clear first by the statement of the price offered by the outsider in the paragraph numbered 1 in the attorney's letter dated 3 May 1990, namely, $11,250,000, secondly by the reference to cl 3.2 of the settlement agreement in the paragraph numbered 2 and the necessity to provide a cashier's order/banker's draft for $500,000 by way of tender deposit and thirdly as provided by the paragraph numbered 3 to submit the tender form together with the tender deposit to the attorneys before 10am on 14 May 1990.

To my mind it is clear that all one had to do to qualify was to offer at least $11,250,000, accompany the offer with the tender deposit of $500,000 in the form required and see to it that it reached the attorneys before 10am on 14 May 1990. There was nothing to prevent any shareholder entitled to the right of first refusal from offering more than $11,250,000 and provided the other requirements of the attorneys stated above being satisfied, from becoming qualified as having properly exercised the right of first refusal, but it would serve no purpose in view of the clear and unequivocal terms of the paragraph numbered 4 of the attorney's letter dated 3 May 1990. On the other hand if that shareholder turned out to be the only shareholder, he or she would be bound by the offer and would end up paying more than the outsider's offer, in this case more than $11,250,000. That is not what the parties intended as I have said before. Only if more than one shareholder qualified as having properly exercised the right of first refusal would the question of having to pay more than the outsider's offer arise and that is what the parties intended.

I have no hesitation in coming to the conclusion that the attorneys' proposed two-stage procedure as being eminently reasonable and being consistent with the intention of the parties to the settlement agreement. I also find that the attorneys' intention to follow the two-stage procedure was clearly and unambiguously spelt out in the letter dated 3 May 1990.

Before leaving the construction issue I should deal with the plaintiff's argument that both initial offers were invalid as they were both submitted after the ten-day period provided for by cl 3.4 of the settlement agreement. Had this argument succeeded it would have rendered the whole exercise carried out by the attorneys abortive. A variety of arguments were advanced by both sides including that of the attorneys' that they were not bound by this clause. I will deal with this argument later in another context. I do not find it necessary to rehearse the contending arguments of the parties as in my view the short answer to this question is to be found in cl 3.4 itself.

The sentence in cl 3.4 which bespeaks the lapse of the right upon the expiry of the ten-day period is followed by a sentence which reads as follows:

> The attorneys shall not be bound to consider any offer received from any shareholder after the lapse of the said ten (10) day period.

The meaning is clear. It simply means that a shareholder cannot insist that his offer be considered but the attorneys are not prevented from considering such an offer on a proper exercise of their discretion. Here both initial offers were submitted within the time stipulated by the attorneys in the letter dated 3 May 1990 albeit the time stipulated being in excess of ten days from 3 May. No objection was taken by the plaintiff at the meeting on 14 May. This afterthought of an argument described by one of the counsel as a 'doomsday argument' is wholly without merit. *Dickson*'s case[1] cited by the plaintiff is a wholly different case and has no application to this case.

Waiver, estoppel and acquiescence issue

In case I am wrong in the conclusions I have reached thus far I should deal with the arguments of waiver, estoppel and acquiescence advanced by the plaintiff on the one hand and the attorneys and the third defendant on the other.

The question really is whether the plaintiff or her solicitors have done anything which prevents her by the doctrines of waiver, estoppel and acquiescence, all equitable doctrines, from insisting upon the strict compliance of cl 3 of the settlement agreement, if it be held that her construction of cl 3 is the correct one.

The facts and circumstances relevant to this issue are those which are either agreed, not disputed or are as found by me:

(i) The attorneys made it plain by the letters dated 3 and 10 May 1990 that there would be a second round of bidding in the event there was a competition.

(ii) The third defendant understood this to be the case and confirmed his interpretation with the attorneys.

(iii) The plaintiff knew, and cannot be heard to say otherwise (in fact she does not), that the attorneys intended to have a second round of bidding in the event of more than one shareholder exercising the right of first refusal.

(iv) Whatever her views on the interpretation of cl 3 she made no protest and did not apply to court for an injunction prior to 14 May.

(v) The third defendant submitted his initial offer as a matching offer on his understanding that there would

be a second round of bidding and expressly stated that 'in the event of there being more than one shareholder exercising the right of first refusal, I am prepared to bid more than the offer of $11,250,000 received by you'. (See exh PHC-3 to his affidavit filed on 1 June 1990.)

(vi) The plaintiff submitted an offer higher than was required when no one asked her to do so.

(vii) On the morning of 14 May 1990 the plaintiff asserted her alleged right and declared that she would stand by her initial bid and not participate in the second round of bidding at 10am on 15 May 1990 but would apply for an injunction (see para 17(a)(i) of her affidavit filed on 5 June 1990).

(viii) The plaintiff did not apply for an interim injunction after the 10am meeting on 14 May 1990 and before the scheduled second round of bidding at 10am on 15 May 1990. Instead, through her solicitor, she communicated to the attorneys at about 3pm on 14 May 1990:

(a) that she wanted to get the matter over with as soon as possible;
(b) that she wanted to avoid unnecessary litigation;
(c) that she would participate in the second round of bidding;

and inquired whether the second round of bidding (the competitive bidding) could be held that same day, 14 May 1990 (see para 35 of the first defendant's affidavit filed on 31 May 1990).

(ix) The meeting scheduled for 10am on 15 May 1990 with the consent and approval of the third defendant was duly rescheduled for 5pm on 14 May 1990 and both the plaintiff and the third defendant were given written notice thereof.

(x) The plaintiff attended the 5pm meeting on 14 May 1990 and submitted her second bid (the competitive bid) as did the third defendant.

(xi) When the result was announced the plaintiff acknowledged 'the matter is all over' and asked for the initial bids to be disclosed. They were. The plaintiff's initial bid was $13,333,000 and the third defendant's $11,250,000. Both competitive bids were higher than their respective initial bids, namely, $14,000,800 and $14,500,888 respectively. (See para 18 of the third defendant's affidavit filed on 1 June 1990 and para 40 of the first defendant's affidavit filed on 31 May 1990 and para 4 of the first defendant's affidavit filed on 5 June 1990).

Having regard to these facts and circumstances I need ask myself only one question and that is whether the plaintiff's conduct in the light of the above facts and circumstances had become such that it would be dishonest or unconscionable for her to continue to seek to enforce her legal or equitable rights.

The test applied by the English Court of Appeal in *Shaw & Anor* v *Applegate*[4] I understand to be the currently applicable test. I am in favour of it and apply it here. At p 130 of the report, Buckley LJ after referring to the five tests laid down by Fry J in *Willmott* v *Barber*[5] at pp 105 and 106 says this:

> I pause to say that that passage must be read in the light of the fact that in that case it was the defendant who was seeking to assert a legal right and the plaintiff who was seeking to escape from it, so that the description of the parties has got the opposite way round to the way in which one would expect to find them described.
>
> As I understand that passage, what the learned judge is there saying is that where a man has got a legal right, as the plaintiffs have in the present case, being legal assignees of the benefit of the covenant binding the defendant, acquiescence on their part will not deprive them of that legal right unless it is of such a nature and in such circumstances that it would really be dishonest or unconscionable of the plaintiffs to set up that right after what has occurred. Whether in order to reach that stage of affairs it is really necessary to comply strictly with all given tests there set out by Fry J may, I think, still be open to doubt, although no doubt if all those five tests were satisfied there would be shown to be a state of affairs in which it would be dishonest or unconscionable for the owner of the right to insist on it.

He then referred to a short paragraph from the judgment of Evershed MR in *Electrolux Ltd* v *Electrix Ltd*[6] at p 33 and proceeded:

> So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J literally applicable and satisfied in any particular case. The real test, as I say, I think must be whether on the facts of the particular case the situation has become such that it would be dishonest, or unconscionable, for the plaintiff, or for the person having the right sought to be enforced, to continue to seek to enforce it.

I have no hesitation in condemning the plaintiff's conduct in this case as being both dishonest and unconscionable. The facts and circumstances plainly speak for themselves.

Having reached this conclusion I need not go into the waiver and estoppel arguments which are but the other side of the same coin as the acquiescence argument.

This would have been sufficient to dispose of the plaintiff's amended originating summons and in support of the orders I made on 25 June 1990 dismissing the plaintiff's claim for the declarations and setting aside the interim injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 and also dismissing the plaintiff's motion to continue the said injunction order.

However Mr Hwang for the third defendant has addressed arguments independently of the other defendants with which I ought to deal, even if I do so only briefly. Furthermore, there is the question of the attorneys' application to set aside the said injunctive orders in

limine on the grounds that they are not proper or necessary parties to these proceedings and even if they were, inter alia, for material non-disclosure and for the want of notice before the ex parte application for the interim injunction was made by the plaintiff.

The contractual and remedies issue

The declarations sought by the plaintiff in the amended originating summons are first, that the attorneys were obliged to open the tenders submitted by the plaintiff and the third defendant in response to the attorney's letter dated 3 May 1990 (the initial offer) (prayer 1(a)); secondly, that the attorneys were bound to accept the higher of those two offers (prayer 1(b)(i)); and thirdly, that the acceptance by the attorneys of the third defendant's second offer of $14,500,888 (the competitive bid) was void and/or of no effect (prayer 1(b)(ii)). The orders consequent on these declarations are to set aside any agreement of sale in respect of the property entered into between the attorneys as the agent of the fourth defendant and the third defendant (prayer 1(c)(i)) and/or to direct the attorneys to accept the plaintiff's initial offer of $13,333,000 for the property being the higher of the two initial offers received by the attorneys and for completion to take place 42 days from the date of such acceptance (prayer 1(c)(ii)).

The alternative declaration sought is that the attorneys were obliged to open the tenders firstly submitted by the plaintiff and the third defendant before calling for fresh or further bids (prayer 2(a)) and that the acceptance by the attorneys of the third defendant's fresh or further offer of $14,500,888 was void and/or of no effect.

I approach this question as Mr Hwang, counsel for the third defendant, did by asking myself what the legal position is regarding the plaintiff's first tender of $13,333,000. It is an undeniable fact that the plaintiff's first tender was not accepted. However, the plaintiff contends that her first tender ought to have been accepted but since it was not, her complaint is really that there was a breach of cl 3 of the settlement agreement and not that there was a binding contract of sale. This is borne out by the relief the plaintiff has claimed by prayer 1(c)(ii) of the amended originating summons which is to direct the attorneys to accept her initial offer of $13,333,000 for the property.

It is also an undeniable fact that the plaintiff made a second tender (the competitive bid) of $14,000,800. It was for a higher amount than her first tender; except for the amount it was in identical terms as her first tender; it was made in specific response to the attorney's letter dated 14 May 1990, earlier referred to, asking for the further bid and advising that the highest bid will be accepted, subject to the initial offer having satisfied the attorney's requirements specified in the letter dated 3 May 1990, also referred to earlier; it was made to the attorneys without reservation or equivocation.

In these circumstances Mr Hwang submitted that the plaintiff's further bid of $14,000,800 amounted in law to a revocation of her first tender of $13,333,000 and therefore the first tender was no longer capable of acceptance. I think this is right. It is supported by authority. (See 9 *Halsbury's Laws of England* (4th Ed) para 239 and *Sutton and Shannon on Contracts* (7th Ed) at p 41.)

Clearly the plaintiff intended her further bid (the competitive bid) to be a valid bid capable of acceptance by the attorneys. When the plaintiff communicated her intention to participate in the further or competitive bidding she also made known her intention to revoke her first tender of $13,333,000.

The plaintiff has also sought a declaration that the attorneys' acceptance of the third defendant's further bid (the competitive bid) of $14,500,888 was void and/or of no effect (prayer 1(b)(ii)) and consequent thereon for an order setting aside any agreement of sale in respect of the property entered into between the attorneys as the agent of the fourth defendant and the third defendant (prayer 1(c)(i)).

I agree with Mr Hwang that these prayers proceed on a fundamental misconception.

It is beyond argument that there is a binding contract between the third defendant and the fourth defendant as the third defendant's further bid (the competitive bid) was accepted by the attorneys on behalf of the fourth defendant. I can see no legal basis for the plaintiff attacking the validity of this contract. At most the plaintiff may have a claim against the attorneys and/or the fourth defendant for a breach of cl 3 of the settlement agreement in which case her claim is for damages against the attorneys and/or the fourth defendant. But no such claim is made.

Thus I conclude that whatever contractual or other claims the plaintiff may have against the attorneys and the fourth defendant for breaches of cl 3 of the settlement agreement, the contract concluded by the attorneys' acceptance of the third defendant's further bid (the competitive bid) cannot in fact or in law be assailed.

Furthermore even if the plaintiff were right in her interpretation of cl 3 of the settlement agreement her claim to the property cannot prevail over the third defendant. The third defendant is the equitable owner of the property by reason of his having already entered into a binding contract for the sale and purchase of the property. (See Cheshire and Burn, *Modern Law of Real Property* (14th Ed) at p 199.)

The attorneys' application to discharge the injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990

The basis of the attorneys' argument is that as they are not parties to the settlement agreement they owed no contractual duty to the plaintiff and accordingly were wrongly made parties to these proceedings. It followed therefore that any injunction order obtained against them was wrongly obtained. For this reason alone the injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 should be discharged forthwith vis-a-vis them.

I have difficulty in accepting this argument as although the attorneys are not named as parties to the settlement agreement it is plainly evident, which even the attorneys would not deny, that they are an integral part of the whole machinery for carrying into effect the terms of the settlement agreement. It has already been noted that it was only after the parties to the settlement agreement had agreed on who were to be the attorneys of each and every one of the parties to the settlement agreement was the settlement agreement itself executed.

Several of the clauses and the sub-clauses in the settlement agreement make reference to the attorneys as though they were parties to the settlement agreement. It was intended by the parties and in fact carried out that each of the parties execute a power of attorney in the appropriate form prescribed in the settlement agreement in favour of the attorneys.

The attorneys were not only necessary for the purpose of implementing the terms of the settlement agreement but in my view were also necessary and proper parties when it came to construing a particular provision in the settlement agreement.

I therefore hold that the attorneys were properly made parties to these proceedings. I think I am supported in this view by the decisions in *Guaranty Trust Co of New York* v *Hannay & Co*[7] and *London Passenger Transport Board* v *Moscrop*.[8]

The interim injunction cannot be set aside on this ground.

Alternatively the attorneys argued that the injunction order ought to be discharged forthwith on the grounds that the affidavit of Mr Ng Wing Cheong, the plaintiff's previous solicitor, filed in support of the ex parte application for the injunction failed to make full and frank disclosures of all the material facts.

Indeed the most significant and material facts were omitted from this affidavit. Mr Ng Wing Cheong's affidavit takes the story up to the end of the 10am meeting on 14 May 1990. He concludes para 14 of his affidavit by saying that he and his clients (the plaintiff and her husband) left the meeting when it was announced by the first defendant that 'he was going to call another bid the following morning'.

He then starts para 15 by referring to the attorney's letter of 14 May 1990 bringing forward the competitive bidding to 5pm on 14 May 1990 but no where in his affidavit does he say why the bidding was brought forward and at whose request it was brought forward. This is a serious omission and conveys a wholly erroneous impression. Furthermore no mention is made of the telephone conversation and what was said by him to induce the attorneys to bring forward the bidding. This only exacerbates the erroneous impression. Admittedly the attorneys' letter of 14 May 1990 is exhibited but that alone would not in my view excuse the omission especially when the letter by itself would not convey the whole picture.

The plaintiff's affidavit filed at the same time as Mr Ng Wing Cheong's affidavit in support of the ex parte application for the injunction makes the same omissions.

The omission of these facts is crucial. Furthermore the plaintiff, as already discussed, has by her conduct acquiesced in the two-stage procedure proposed by the attorneys. If she believed that the two-stage procedure proposed by the attorneys was wrong she should not have waited till after the competitive bidding to apply for an injunction but should have applied for it earlier. She could well have done so before the scheduled competitive bidding on 15 May 1990 but instead she requested for the bidding to be brought forward.

The seriousness of these omissions are sufficient to discharge the injunction.

The attorneys further submitted that at the time the plaintiff made her ex parte application, ie after the competitive bidding, there was no urgency which justified an ex parte application. There was also no justification for the plaintiff applying ex parte without notifying the attorneys or the solicitors for the fourth defendant. The plaintiff and her solicitors were aware that the parties had solicitors and who they were.

The foregoing submissions of the attorneys are well founded and supported by the twin cases of *Tunas (Pte) Ltd* v *Mayer Investment Pte Ltd & Ors*[9] and *Castle Fitness Consulting Pte Ltd* v *Manz*.[10] I would accordingly and notwithstanding that I have already discharged the said injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 discharge the said injunction on these grounds as well and order an inquiry into damages to be assessed by the registrar.

After I delivered my decision on 25 June 1990, the plaintiff made an oral application for the injunction to continue pending the filing of a notice of appeal. This

application was based on the principles stated in *Erinford Properties Ltd* v *Cheshire County Council*.[11] I refused the application.

At the same time I heard applications under two other originating summonses, one by the third defendant (OS No 684 of 1990) and the other by the fourth defendant (OS No 661 of 1990) seeking the removal of caveats lodged by the plaintiff against the property. I ordered the caveats to be lifted. I felt compelled to do so in view of the conclusions I had reached in these proceedings and my refusal to grant the plaintiff a stay.

To summarize my orders, they are:

(1) The declarations sought by the plaintiff in the amended originating summons are dismissed.
(2) No orders are made on the consequent reliefs sought.
(3) The interim injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 is set aside.
(4) The plaintiff's motion to continue the interim injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 is dismissed.
(5) The plaintiff's application for a stay, that is for the injunction to continue until the filing of a notice of appeal, is refused.
(6) On the attorney's application by summons-in-chambers, the interim injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 is also set aside on the grounds of material non-disclosure and want of notice.
(7) An inquiry into damages to be assessed by the registrar.
(8) Costs of the amended originating summons, the plaintiff's motion to continue the injunction and the attorneys' summons to discharge the injunction to be taxed and paid by the plaintiff to the defendants on the basis that the first and second defendants (the attorneys) shall be entitled to only one set of costs.

Order accordingly.

Solicitors: *Ramdas & Wong*; *Drew & Napier*; *Allen & Gledhill*; *Khattar Wong & Partners*.

Reported by *S Surenthiraraj*

Wong Meng Yuen Eddie & Anor v Soh Chee Kong & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 386 OF 1990
KARTHIGESU JC
20 JULY 1990

Land Law — Agreement for sale and purchase of property — Right of purchaser to rescind agreement if government requisitions unsatisfactory — Road widening proposal — Whether requisition unsatisfactory

The plaintiffs were the owners and vendors of a piece of land ('the property'). The defendants are Buddhist monks who agreed to purchase the property from the plaintiffs under an agreement in writing. They paid a deposit of 10% of the purchase price. The property was residential property and was zoned as such. The sale was subject to the Singapore Law Society Conditions of Sale 1981. Clause 9 of their agreement provided that the sale was to be subject to the purchasers' solicitors receiving satisfactory replies to their requisitions to government departments. It was further stated in cl 9 (ii) that any such replies indicating that the said property would be affected by road proposal arising from a redevelopment of the said property shall not be deemed unsatisfactory. After the purchasers had sent out their requisitions, they informed the sellers that the property was affected by a road widening proposal, and they were therefore entitled to rescind the agreement. The road proposal that affected the property would only be implemented either on the development of the property or on a road construction being carried out whichever is earlier. The sellers disputed the rescission and claimed that the defendants had purchased the property for the purpose of building either a temple or for converting the existing building on the property into a temple. The sellers therefore started the present proceedings and claimed, inter alia, the forfeit of the defendants' deposit. The defendants denied that they had that intention.

Held, dismissing the plaintiffs' claim:

(1) The court was not satisfied that on the balance of probabilities the sellers have established that the purpose of the purchase was to rebuild on the site a temple or to convert the existing building into a temple.

(2) Since it was the sellers who were seeking to rely on cl 9(ii), the burden of proof was on them. Since they were not able to discharge this burden, they could not rely on cl 9(ii) to argue that the requisition was in fact satisfactory.

(3) The test to be applied is an objective one as to whether the property is adversely affected by a road proposal. The fact that there is no current programme does not make the proposal any less a proposal. The existing state of affairs is that there is a proposal and whenever implemented, the area affected would constitute about 23% of the total area of the property.

(4) The existence of such road proposals were within the contemplation of the vendors and the purchasers in this case and they sought to specifically provide for it by including cl 9 in their contract. The court's duty is to interpret it and to give effect to the intention of parties.

Cases referred to

1 *Tatlien Hardware Pte Ltd* v *Tan & Lie & Anor* [1982] 1 MLJ 9 (folld)